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Lecture

Must the American Criminal Justice System Be Impotent?*

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I.

Crime is morally and materially costly. It endangers the social order, affronts society and arouses fear, diminishing the tranquility and the freedom to which citizens are entitled. Violence, so often part of crime, is harmful morally and materially, while property crimes unjustly transfer wealth from victims to criminals. The risk of such transfers and the cost of private and public protection are part of the cost of crime. Although some recent practices seem to suggest otherwise, restitution to the victim cannot offset these social costs, let alone discharge the penal liabilities of criminals. Restitution, at most, discharges the civil debt owed by the offender to the victim.

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The views expressed in this article are the sole responsibility of the author.

II.

Crime rates have long been much higher in America than in Europe.[1] Many causes have been alleged. Perhaps heterogeneity, pluralism, federalism, liberty, or demographic factors explain part of the difference. But learning as much is not helpful because we cannot or will not give up any of these features of our society. Similarly, genetic, social and psychological causes of crime such as low intelligence, broken families, or parental mistreatment are not likely to be greatly affected by any remedies which society can devise. Although still favored by presidential commissions, poverty, inequality and bad housing have also been discredited as causes of crime.

Consider poverty. America is the world's wealthiest major country; yet it also has one of the world's highest crime rates — a crime rate higher in prosperity than in depression, and which rises "with increases in median family income."[2] There is inequality. However, no correlation has ever been demonstrated between crime rates and inequality or, for that matter, lack of public housing. Reducing inequality may be worthwhile per se; but even if, despite differences in effort and ability, we all received the same income — hardly a realistic prospect — there would still be inequality because some of us would spend our income on receipt (or even before) and others would save a portion. Enough inequality would remain to motivate robbers or burglars. Further, criminals may well victimize persons of equal wealth or even those who have less than they do.

Little can be done about these alleged causes of crime. They are of but academic interest to anyone who wants to reduce crime rather than use it as a pretext for social reform. Hence, the sanctions of the criminal justice system are the only realistic hope we have for controlling the crime rate.

Attempts by the criminal justice system to strengthen sanctions are costly.[3] They require politically difficult reforms: more

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1. *See, e.g.*, H. ZEISEL, THE LIMITS OF LAW ENFORCEMENT, (PASSIM) (1982).

2. J. WILSON & R. HERRNSTEIN, CRIME AND HUMAN NATURE 328 (1985).

3. Prison operation costs alone (exclusive of construction costs) have been estimated from $10,000 to $40,000 per inmate per year. D. MCDONALD, THE PRICE OF PUNISHMENT: PUBLIC SPENDING FOR CORRECTIONS IN NEW YORK 17, 55 (1980). The cost of constructing

and better police, more prosecutors and better judges. In the short run, more prison space may be needed too. However, in the long run, the inmate population need not increase. If prospective criminals can be deterred by punishing actual criminals and punishing them more severely, ultimately fewer, rather than more, prison cells will be needed. There would be fewer criminals, although a greater proportion would be imprisoned. Reformers who try to discourage the public from strengthening penal sanctions by pointing to the additional prison space needed totally disregard the deterrent effect of imprisonment — that is, the ultimate reduction of the crime rate.[4]

The cost of better crime control is likely to be less than the cost of uncontrolled crime. However, the cost of crime is mainly borne by victims, whereas the cost of controlling crime is borne by the taxpayers whose representatives do not find it politically expedient to increase appropriations for crime control. It does not bring votes.

If the necessary money were spent, another more thorny problem still would remain. The sanctions of the criminal justice system are effective only if inflicted on the guilty and not on the innocent. If innocents were as likely to be punished as guilty persons, the threat of punishment could not lead anyone to avoid crime. But, the attempts of the criminal justice system to discriminate between the guilty and the innocent are not foolproof and allow guilty persons to go free if their guilt cannot be proved. Yet, if the evidence required for conviction were significantly reduced, or if essential procedural safeguards were weakened to increase the proportion of offenders convicted, the risk of convicting innocents might increase. Attempts to convict a higher proportion of offenders also might inconvenience persons not guilty of any offense, or curtail liberties. By searching or arresting people on slight suspicion, we may well find more offenders — but at a cost borne by suspected non-offenders.

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a single prison cell is $30,000 to $200,000. M. SHERMAN & G. HAWKINS, IMPRISONMENT IN AMERICA: CHOOSING THE FUTURE 2 (1981) (cost estimated to be $30,000 to $60,000); Gottfredson, *Institutional Responses to Prison Crowding*, 12 N.Y.U. REV. L. & SOC. CHANGE 259, 262 (1984) (cost of constructing an average prison cell will exceed $200,000).

4. *See* J. WILSON, THINKING ABOUT CRIME 175-77 (1975); *see also* J. FINCKENAUER, SCARED STRAIGHT! AND THE PANACEA PHENOMENON 29-44 (1982); F. ZIMRING & G. HAWKINS, DETERRENCE, THE LEGAL THREAT IN CRIME CONTROL 234-41 (1973).

Textbooks usually give four purposes of punishment:

1. Justice
2. Deterrence[5]
3. Incapacitation
4. Rehabilitation[6]

Deterrence most directly addresses the crime rate. Crime is rewarding to the criminal only if its expected benefit exceeds its expected cost by more than other activities available to him. No cost is likely to be high enough to make crime unrewarding for everybody. Some persons enjoy risks, or underestimate actual costs. A few may even commit crimes for the pleasure of it, regardless of costs. Still, the cost which can be imposed on the criminals can suffice to make crime unrewarding for most people most of the time. The threat of punishment is the major disincentive available.

To help control high crime rates, the criminal justice system can increase the probability of punishment, the severity, or both. Probability is much costlier to increase than severity. It is easier to sentence criminals more severely than to catch and convict more of them. But, it should not matter whether we increase probability or severity. For a "career criminal" who commits numerous offenses every year, it does not matter materially whether, over a period of five years, he serves two years once (low probability, high severity) or one year twice (high probability, low severity). Either way, over five years, he serves two years in prison. However, there may be some differences in the psychological impact: the delayed punishment may be perceived as less probable. Furthermore, most offenders concentrate on the short term.

Criminal opportunities obviously strike the eye of the career criminal. However, most people ignore them because they be-

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5. I shall disregard "special deterrence" (intimidation) of the person actually punished, since it does not differ from rehabilitation: either is meant to achieve the nonrecidivism of the person punished, albeit by a different method. When speaking of deterrence, I shall henceforth mean deterrence of others than the person punished.

6. *See, e.g.*, S. KADISH, S. SCHULHOFER & M. PAULSON, CRIMINAL LAW AND ITS PROCESSES 187-210 (1983). For more analysis of the purposes, see F. CULLEN & K. GILBERT, REAFFIRMING REHABILITATION (1982) (rehabilitation); J. WILSON, THINKING ABOUT CRIME 173-74 (1975) (incapacitation); F. ZIMRING & G. HAWKINS, DETERRENCE, THE LEGAL THREAT IN CRIME CONTROL 234-41 (1973). *See generally* J. WILSON & R. HERRNSTEIN, *supra* note 2, at 492-98.

lieve that "crime does not pay." They have internalized the moral restraints which form their law-abiding habits. In the words of James Fitzjames Stephen, "Some men, probably, abstain from murder because they fear that if they committed murder they would be hanged. [They fear that murder does not pay.] Hundreds of thousands abstain from murder because they regard it with horror. [They abstain because of moral restraints.] One great reason why they regard murder with horror is that murderers are hanged. [The threat of punishment generates moral restraints which are internalized and form law-abiding habits.]."[7]

Sir James' formulation explains why the criminal justice system mainly deals with two relatively small and marginal groups: those who did not sufficiently internalize most moral restraints and are committed to criminal careers, and those with almost normal moral restraints who are tempted by exceptional opportunities or needs. Once habitually committed to crime, criminals can seldom be deterred by feasible threats. The legal threat of punishment is important because it deters most people from *becoming*, rather than from being, criminals. The actual punishment of criminals is indispensable; first, to make the threats of the law credible and, second, to serve as a further threat to prospective offenders.

III.

Textbooks often give the erroneous impression that the crime rate depends on the psychological causes dwelled upon. However, these causes determine only *who* is capable of committing crimes. They do not determine the crime rate. Far more people are capable of committing crimes than actually do — just as far more people are capable of becoming dentists or delicatessen clerks than actually do. The important question is: why do no fewer and no more of the available individuals actually become dentists, delicatessen clerks, or criminals? What determines *the rate* of these activities at any given time?

The rate of crime depends on the comparative net benefit expected, as does, *mutatis mutandis*, the rate of dentistry or of

7. H. GROSS, A THEORY OF CRIMINAL JUSTICE at 489 (1979).

delicatessen clerking. The net benefit equals the market value of the proceeds of crime, less the costs imposed on the criminal by the courts, that is, the risk of punishment which equals the threatened punishment divided by the probability of suffering it. The threatened punishment itself, which must be discounted by the improbability of suffering it, is only the legal list-price of crime.

While the gross benefit to the criminal in property crimes depends on the market price of the proceeds, the gross benefit of non-property crimes may be independent of any market. This is the case for rape, for the unlawful taking of money and, indeed, whenever the proceeds are directly consumed by the perpetrator. Many crimes are mixed. The rapist may rob the victim and take her money as well as her watch. Whatever the combination, an increase in the costs imposed by the courts will lead to a reduced net benefit for the criminal and, therefore, to less crime. There may well be a point of diminishing returns for such cost increases; there is no evidence to indicate we have reached it.

Factors other than threatened punishments may affect the expected comparative net advantage of crime. By making legitimate opportunities available or by increasing the benefits they yield, the *comparative* net advantage of crime can be reduced. Unfortunately, all attempts to do this have come to naught.[8]

In theory, one can increase the cost of crime by increasing moral restraints, by strengthening education or religion; in practice, the criminal sanction is indispensable. To illustrate, if we want to reduce littering, education and numerous strategically placed waste containers will help. However, neither will avail unless punishment is available as well. The punitive threat alone could accomplish the purpose although in less than optimal fashion. Education and the containers alone could not.

IV.

By trying to get what they want by illegal means, criminals act quite rationally if they can expect a comparative net advantage. It is society that acts irrationally by allowing crime to be profitable, yet objecting to it. Yet we are told *ad nauseam* by

8. *See* W. LUKSETICH & M. WHITE, CRIME AND PUBLIC POLICY 117-42 (1982).

sociologists and psychologists that criminals are neither rational nor calculating and that, therefore, threats of punishment will not deter them; or, we are told that criminals do not expect to be caught, wherefore threats are idle.

The first part of both these propositions is irrelevant and the second untrue. Criminals indeed do not expect to be caught; if they did, they would not commit crimes. But, they are aware of the *risk* of being caught and are accordingly affected by the probability and severity of threatened punishments.

As we all do, criminals behave as though calculating. Calculation is embodied in our habits, though not necessarily in our awareness. When we choose cheap or expensive restaurants or shops, we do not engage in elaborate calculations each time. We have evolved an habitual life style based on what is available and profitable for us. So have criminals. Although not calculating, criminals, as do all sentient beings, respond to incentives and disincentives. Rationality is not needed for such responses which are equally characteristic of law-abiding citizens, criminals and rats. Calculations are needed only for predicting the responses of others.

To be sure, the same incentives or disincentives have different impacts on different individuals or on the same individuals in different situations. A disincentive sufficient for habitually law-abiding citizens does not suffice to deter habitual criminals. Disincentives strong enough to deter most people most of the time still do not suffice to deter all people all of the time. However, legal disincentives should suffice to deter from criminal conduct most young males. They are most often tempted. Yet, our sanctions have conspicuously failed to deter as many as could be deterred.[9]

V.

The discussion thus far has been concerned with deterrence without referring to justice. However, justice is indispensable to

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9. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS; CRIME IN THE UNITED STATES 161 (1984) (published annually). *See* J. FINCKENAUER, *supra* note 4 at 29-67 (1982); J. WILSON, THINKING ABOUT CRIME 206-07 (1975); P. HAHN, THE JUVENILE OFFENDER AND THE LAW 3-4 (2d ed. 1978); M. HASKILL & L. YABLONSKY, CRIME AND DELINQUENCY 366-67 (3d ed. 1978).

deterrence. Deterrence rests on discriminating between the guilty and the innocent, that is, on doing justice. If we threatened and punished not only the guilty but the innocent as well, we could not hope to deter prospective criminals for they would run no greater risk than noncriminals. Further, justice demands that the gravest crimes, those that harm and offend us the most, be punished most severely. So does deterrence: we want to deter the gravest crimes more than others and hence must threaten the harshest punishments for them.

Unlike justice and deterrence, rehabilitation and incapacitation are irrelevant to the crime rate, except when the pool of prospective criminals is limited. Only in this exceptional case do fewer remain as more become incapacitated, or are willing to give up crime because of rehabilitation. Usually, however, the pool of potential criminals is no more limited than the pool of potential dentists, farmers, or delicatessen clerks. Not that everyone is a potential everything. One may need dispositions and abilities such as physical stamina or manual dexterity to become a criminal or a dentist. However, the number of potential dentists, farmers, delicatessen clerks, or criminals so much exceeds the number of active ones that incapacitation or rehabilitation can scarcely make a difference. Those who have been deactivated are readily replaced unless the expected comparative net advantage does decline enough to dissuade new recruits. The only practical way of dissuading new recruits is to increase the cost of crime to them, thereby reducing their net advantage. Thus the only practical means of increasing deterrence is to increase effective legal sanctions.

VI.

In the United States only a small proportion — less than three percent — of all those arrested for a felony are punished by imprisonment.[10] Even in the best of circumstances, only a small percentage of all crimes is ever punished — so small that the activities of any criminal justice system mainly serve to stigmatize crime and vindicate the social order symbolically. Nonetheless, the criminal justice system is effective: most people

10. J. WILSON & R. HERRNSTEIN, *supra* note 2, at 425.

avoid committing crimes. Perhaps sanctions and lotteries are effective for the same reason. Many people buy lottery tickets although the chances of winning are infinitesimal, far smaller than the chances of being punished for a crime. People irrationally hope to win in spite of low probability. Analogously, people may avoid crimes because of irrational fears of losing, in spite of low probability. Their anxieties about violating the laws lead most people to overestimate their chances of being caught and punished. Crime, we have all learned, will be followed by punishment. Anxieties are commingled with realistic fears. Even a three percent rate of punishment means taking a chance greater than appeals to most people most of the time. However, that chance is taken quite often by those who make crime their trade. Currently, the chance of severe punishment is not great enough to discourage as many as we wish. A five percent chance, which is quite feasible, may well halve the crime rate.

Withdrawal of the immunity in practice now granted juveniles,[11] would by itself reduce the crime rate. The available data about juvenile crime and punishment do not permit a full analysis. However, in 1933, with forty-six percent of the population under age twenty-five, thirty-nine percent of all those arrested were less than twenty-five years old. In 1980, though comprising only forty-one percent of the population, fifty-six percent of all those arrested were under twenty-five. Other data confirm that there is currently more juvenile crime relative to adult crime than in the past.[12] The explanation is quite simple. Since 1933 we have effectively given immunity to juveniles, a practice which ought to be stopped. Those charged with crime should be tried in adult courts and exposed to the same sanctions as adults. Insufficient competence should be presumed as a matter of law only when the suspect is less than twelve years of age. If incompetence is claimed by defendants over twelve years of age, it should be decided on by the courts in each case according to the evidence.

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11. *See* MODEL PENAL CODE §§ 6.05, 4.10 (1974); N.Y. CRIM. PROC. LAW §§ 720.10, 720.20 (Consol. 1984); N.Y. PENAL LAW § 60.02 (Consol. 1975).

12. *See* FEDERAL BUREAU OF INVESTIGATION, *supra* note 9, at 167; *see also* J. WILSON, *supra* note 9, at 206; Avi-itzhak & Shinnar, *Quantitative Models in Crime Control*, 1 J. CRIM. JUST. 185, 196-97 (1973); Wellford, *Age Composition and the Increase in Recorded Crime*, 11 CRIMINOLOGY 61 (1973).

Crime rates declined in the United States during the nineteenth century and indeed up to the 1960's. However, between 1960 and 1975, there was a rapid rise — 232%. Homicide rates increased to 10.2 per 100,000 by 1974, from 4.7 per 100,000 in 1961. Burglaries tripled in ten years; robberies more than tripled. Despite this rapid rise in crime, the number of persons in prison declined from 118 per 100,000 to 70 per 100,000. While crime rates rose, imprisonment rates declined. Indeed the probability that a felony "would result in imprisonment decreased *fivefold.*"[13] It takes no great acumen to conclude that crime rose *because* the risk of imprisonment declined. The judiciary, in charge of applying sanctions, became reluctant to convict and imprison. Just as punishment can control crime, nonpunishment can decontrol it. This is what happened in the 1960's. Criminals were spared and victims suffered. They still do. This seems as good an argument for mandatory and determinate sanctions and for reform of judicial procedures as can be imagined.

Judicial policies alone did not cause the rise of the crime rate in the 1960's. There was an increased number of young males in the crime-prone ages and other contributory factors during this prosperous period. But the added young males accounted for less than half of the rise in property crimes and no more than ten percent of the rise in violent crime.[14] Clearly, crime rose rapidly between 1960 and 1980 because the severity and frequency of punishment declined. The cost of crime to the criminal was reduced by decreasing the severity and frequency of sanctions. Wherefore, the net benefit of crime to the criminal rose.

VII.

Regardless of what TV viewers are led to believe, seasoned lawyers admit that most individuals charged with crime are guilty. Nearly ninety percent avoid trial by pleading guilty to lesser crimes than those charged.[15] Prosecutors accept such pleas because trials are hazardous, cumbersome and time-consuming.

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13. J. WILSON & R. HERRNSTEIN, *supra* note 2, at 425.
14. *Id.* at 140-43.
15. L. WEINREB, DENIAL OF JUSTICE 71 (1977).

Though some unwieldiness and hazards are unavoidable, much of the problem is caused by time-honored, though otherwise unjustifiable judicial practices.

The purpose of a trial is to determine whether a defendant who has pleaded not guilty is, in fact, guilty of any of the offenses with which he has been charged. Courts can find the truth they seek only by evaluating the evidence. Accordingly, they need to consider all available evidence. However, our courts have given a lower priority to the orginal purpose of a trial than they have given to an unrelated purpose which they have added: to discipline law enforcement agencies so as to restrain them from unlawful acts. To pursue this added purpose, courts are willing to defeat the original purpose of trials by not admitting available evidence, however credible and decisive, if it was obtained by illegal means. Yet, police are not restrained by the courts' discarding evidence illegally obtained, or by the nonconviction of guilty defendants.[16]

Police could be disciplined by direct means. Officers suspected of unlawful acts should be prosecuted by special prosecutors who, not being involved in any other prosecutions, would not depend on the cooperativeness of the defendant officers' colleagues. Unlike the exclusion of evidence, such prosecutions would not interfere with determining the guilt or innocence of the defendants. There is no reason for not admitting all evidence relevant to the guilt or innocence of defendants. How it is obtained is irrelevant. Only its credibility matters. Nor is there any reason for shielding juries from evidence thought to be prejudicial, if it is relevant to any degree. If juries are capable of deciding on guilt and innocence, they are capable of distinguishing between what is relevant and what is merely prejudicial.

Lawyers often prevent clients from confessing guilt, except in exchange for a reduction of charges. Under present rules, this is their duty.[17] But confession not only is good for the soul for it may lead to moral regeneration; confession also helps justice, if

16. Kamisar, Brewer v. Williams, Messiah *and* Miranda: *What Is "Interrogation"? When Does It Matter?*, 67 GEO. L.J. 1, 97-98 (1978). *See also* Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417 (1985); van den Haag, *Limiting Plea Bargaining and Prosecutorial Discretion*, 15 CUMB. L. REV. 1 (1984).

17. *See* ABA, STANDARDS FOR CRIMINAL JUSTICE, Standards 3-4.1 and 3-4.2 (1980).

not lawyers. Suspects should not be allowed to see lawyers or anyone other than physicians during the first forty-eight hours of detention. The availability of physicians on demand would preclude physical mistreatment. Statements made by suspects should always be admitted and evaluated by the court. They will be more credible if videotaped. *Miranda v. Arizona*,[18] the Supreme Court decision which excludes confessions made in the absence of counsel unless the suspect had knowingly declined counsel, does not serve justice, reduce crime, or protect those unjustly suspected. As do all exclusionary rules, *Miranda* helps the guilty, not the innocent, by excluding confessions and other evidence of guilt.

Prosecutors should be duty bound to charge suspects with all crimes for which they can find sufficient evidence. Charges for which they have sufficient evidence should be dismissed only with judicial permission to be granted when it serves the purpose of justice. Guilty verdicts should require the assent of only two-thirds of the jury, rather than the unanimity which makes conviction of the guilty so difficult now. Prosecutors should be allowed to ask the defendant pertinent questions in court, although constitutionally the defendant cannot be compelled to answer. Contrary to judicial enlargements of this protection, courts should be expected to draw appropriate inferences from a defendant's failure to answer. To try a defendant without being allowed to ask about his version of events is the equivalent of presenting *Hamlet* without the prince, and just about as odd.

VIII.

As penology has developed, the range of sanctions has been reduced. We punish offenders by fines, prison, or death. Executions are now rare. In an average year, there are about 20,000 homicides, fewer than 300 death sentences and between twenty and thirty executions.[19] Prison is often replaced by conditional, slightly supervised liberty such as probation and parole. Only a small part of every prison sentence is actually served in prison.

Corporal punishment may well be less severe, more effective

18. 384 U.S. 436 (1966).

19. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN No. NCJ 98399 Capital Punishment 1984.

and less costly than incarceration. However, a reintroduction of corporal punishment is clearly out of the question for psychological reasons. None of our punishment is corporal, except for the death penalty, and the death penalty has become controversial enough to be abolished in most Western countries.

Fines are rather ineffective since laws stipulate maximum and minimum fines without regard to inflation or the financial resources of the offender. To accommodate these factors, fines should always be "income-day fines": the offender should be fined a number of days of his income as determined by the court. Income-day fines could replace imprisonment more frequently than fines currently do. Defendants who do not have enough legitimate income to pay income-day fines, if willing to earn the money needed rather than go to prison, should be permitted to submit an appropriate plan of work and payment to the court based on their income-earning ability.

Prison still would be needed for those unwilling to pay their fines. Prison is indispensable as well when the crime is so grave that no other punishment would adequately stigmatize it, or when the offender is a danger to the community because of persistent violence or other criminal conduct.

For many offenders, however, incapacitation by means other than prison might do. The offender might be exiled to some small out-of-the-way place where, supervised by the local police, he could be forbidden to use any means of transportation without permission. If unable to make a living, he would go on welfare and the locality to which he was exiled would be reimbursed. In a small and remote place, it would be as impossible for a convict to engage in muggings, burglaries, or other criminal activities as it would be in a prison. Yet, the offender would have more liberty, while the cost of exile would be a fraction of the cost of imprisonment.

Exile has a long history and suffers from a bad reputation acquired because of political use and of notorious places of exile, such as Devil's Island. Yet, when properly used, exile is effective, more humane and less costly than prison. So are income-day fines.

IX.

Imprisonment, likely to remain the punishment for many crimes, currently keeps most prisoners idle while failing to motivate those who work. Prison pay scales are counterproductive.

Offenders who must be imprisoned fall into two classes: those likely to try to escape, usually long-term prisoners, and those unlikely to try. Only the former require high security prisons. The latter may be discouraged from escaping by the threat of severe punishment for actual or attempted escapes and by their own desire not to live as fugitives. Further, convicts may be asked to furnish bail for the duration of their sentence, as many did before conviction, if the sentence is to be served in a non-security prison.

Non-security prisons should be dormitories, without most of the physical security precautions now characteristic of prisons. Inmates should be expected to work within the prison precincts for market-determined wages with deductions for taxes, room and board, family support and, when ordered, restitution. However, prisoners should retain enough of their wages, perhaps no less than a third, to give them an incentive to work. Many prisoners are unaccustomed to regular work, the most promising habit they could form in prison. Prisoners who, despite the incentives, refuse to work in a satisfactory fashion should be maintained on welfare standards. Purchase of amenities and rental of private rooms within the prison should be permitted, but only with money earned in prison.

Prison products could be sold primarily to government and non-profit organizations at market prices.[20] Agriculture, which offers no prospect of employment after release, should be avoided for urban convicts.

The idea that frequent contact with family and friends helps to rehabilitate has never been proven. Family and friends did not prevent the offenses that led to conviction, yet prisons are built near urban areas to accommodate them. Prisons would be cheaper to build and run outside metropolitan areas.

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20. Work is best performed in factories run by private enterprise on prison grounds. They may be lured by appropriate enticements. Burger, *Prison Industries: Turning Warehouses into Factories With Fences*, 45 PUBLIC ADM. REV. 754, 757 n.5 (1985).

X.

At present, judges select prison sentences from within a wide range with a minimum and a maximum fixed by law. Judges also tend to give indeterminate sentences, for example, from five to twenty-five years, leaving parole boards to decide when to release prisoners who have served the minimum sentence. The prison administration may further reduce sentences by as much as half by granting "time off for good behavior." These discretionary provisions lead to great disparities in sentences and in actual time served by different convicts for the same crime. Judicial and parole discretion were intended to adapt sentences to the individual criminal and the circumstances of his crime and to ensure that imprisonment did not exceed the time needed for rehabilitation. But discretion actually leads to sentences adapted to the individuality of the judge and to parole decisions based on guesswork.

Deterrence would be served best (and justice would not be served less) if all sanctions were mandated by law, leaving courts with discretion over no more than ten percent of the mandated sentence. Reduction (or increase) of the mandated sentence by more than ten percent should be allowed only with a full judicial explanation by the sentencing judge, with the right to appeal afforded to both the defense and prosecution.

Sentences should be flat as well as determinate. Parole boards might well continue to supervise released prisoners, but they should have no influence on the time originally served. Knowledge of the prisoner's behavior in prison, the only knowledge not available to the sentencing court, does not enable parole boards to predict his behavior upon release. Anyway, the prisoner is punished for what he did, not for what he might or might not do. Time off for good behavior should never exceed ten percent of the total sentence; otherwise, the sentence cannot be a true deterrent.

Would justice be served if sentences actually could reflect the individuality of each criminal and his circumstances? Assume that Smith steals $500 to clothe his needy children, Brown to go to graduate school, and Jones to buy liquor. Is the proposition, "Theft of $500 is to be punished by X days imprisonment, unless it be done to clothe one's children (in which case there is a discount), or to attend graduate school (a smaller discount), or

to get drunk (a surcharge)," more just than the proposition, "Theft of $500 is to be punished by X days in prison?" Should the absence of needy relatives increase punishment? Should we leave it to each judge to decide whether devotion to alcohol (seen as a vice *or* a disease) is worse than devotion to graduate study? What weight should be given to the harm done? Should greed be less mitigating than jealousy? Should the customariness of unlawful behavior in a given environment be mitigating? Or the unusualness? Should the poverty, wealth, or youth of the offender or victim be a factor? What weight should these factors have and what factors should mitigate or aggravate the crime?

Judges, not being all of one mind, will evaluate identical factors differently. What indeed could enable any judge to understand and evaluate the unique personalities and life circumstances of offenders? What criteria are to be considered in determining a punishment? Can judges really take into account the differences in heredity, environment and opportunity which produce different personalities? Can criminal justice take full account of the variety, can it correct the unfairness of life? Charitable attempts to do justice to individuals must end in arbitrariness, injustice and reduced deterrence. Although crimes can be punished only by punishing criminals, we come nearest to justice — and to equality — by punishing criminals according to their crimes, and, only exceptionally, according to what we can learn about their personalities, circumstances, or motivations. Thus, sentences should depend only on culpability, previous convictions, arrests[21] and the seriousness of the crime. Crimes should be legally classified with determinate punishments mandated without parole.

Equality does not assure justice, for equal injustice is quite possible. However, inequality necessarily implies some injustice. One, if not both, of two unequal sentences must be unjust and will be perceived as unjust, if the crime was (or was perceived to be) the same. If one punishment is just, any other must be unjust, whether harsher or milder than deserved, less or more than

21. Prior arrests without conviction do not demonstrate guilt. FED. R. EVID. 404(b). But a person presently found guilty of an offense should have been warned by his prior arrests. His failure to heed these warnings could legitimately be taken into account in the mandated sentence. *See* N.Y. PENAL LAW §§ 55.05, 70.10 (Consol. 1973).

optimally deterrent. Hence, equality, reasonably felt to be part of justice in sentencing, is often mistaken for the whole of it. Mandated punishments, which would be equal punishments, would strengthen the sense that justice has been done.

The law must do justice not only to offenders but also to victims of crime. The offender does not take the life-circumstances of the victims into account, and society need not assume a moral obligation to take into account the offender's life-circumstances. More important, courts must do justice to future victims of offenders. Future victims are more entitled to protection from victimization than present offenders are to protection from severe mandated sentences. Offenders volunteered to take the risk of the mandated punishments. Prospective victims never volunteered to be victimized. Because offenders volunteered for the risk of the mandated sentence, that sentence cannot be unjust — though it may be wise or unwise — anymore than an accident, suffered by someone who volunteers for a risky enterprise such as mountain climbing, can be just or unjust.

The injustice to future victims done by attempting to do justice to the individuality of current offenders is often overlooked because the current offender is an identifiable individual who is tangibly present in court and usually wretched. The victims of future offenses cannot be present; nor can they be identified. They are "statistical persons," abstract and ghostly figures who do not invite our compassion and scarcely appeal to our sense of justice. By nature and conditioning, we tend to be impressed by identifiable persons. We try to do justice to them, often at the expense of anonymous statistical persons. Yet, the absence of future victims from the courtroom does not invalidate their claim to protection.

XI.

Many aspects of our current criminal justice system cause it to be less effective than it should be. Changes along the lines I have suggested are in the offing but will take a long time to implement. It took our courts quite some time to pull the teeth out of our criminal justice system. Perhaps, it will take less time to replace them.